Supreme Court, U.S.
FILED
SEP 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS SWINT, etc., *et al.*,

Petitioners,

—v.—

PULLMAN-STANDARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT PULLMAN-STANDARD IN OPPOSITION

*Floyd Abrams
Thomas J. Kavaler
Samuel Estreicher
Taryn V. Shelton
Peter Phillips

CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

**Counsel of Record for Respondent Pullman-Standard, Inc.*

Of Counsel:

C.V. Stelzenmuller
BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000

QUESTION PRESENTED

Did the Court of Appeals err in holding not "clearly erroneous" the findings of the District Court that respondent's seniority system with one of its unions was neither adopted nor maintained with discriminatory intent, and hence was bona fide under Section 703(h) of Title VII of the Civil Rights Act of 1964?

LIST OF PARTIES

Pullman-Standard ("Pullman" or "the Company") respectfully offers to correct the list of parties, as it appears on page iii of the Petition. William B. Larkin, Spurgeon Seals, Jesse B. Terry and Edward Lofton are not properly parties to this appeal. They were plaintiffs-appellants in appeal No. 84-7319 below—an independent action consolidated on appeal with Nos. 87-7057 and 86-7886—seeking review of the District Court's denial of their motion to transform the 1976 dismissal of their action with prejudice into a dismissal without prejudice. The denial was affirmed by the Eleventh Circuit below; it is not mentioned in this Petition, and no issue presented in that case has been asserted in this Petition.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	8
A. Petitioners' Alleged "Four Seniority Related Practices" Mischaracterize The Record And, At Bottom, Constitute Merely A Disagreement With The Factual Findings Of Both Courts Below	9
1. Post-Act Intradepartmental Promotions	9
2. The Creation of Separate IAM and USW Departments in 1941	10
3. The Alleged Creation of Eight New Departments in 1954	10
4. The 1965 Training Requirement	11
B. The Purported Conflicts Among The Circuits Do Not Withstand Analysis	12
1. Petitioners Improperly Characterize The Focus Of The Court Below As Restricted To The Neutrality Of The Literal Terms Of The Seniority Rules	12
2. IAM's Motive May Not Properly Be Imputed To Pullman	14

PAGE

3. The Court Below Properly Placed The Burden of Persuasion On Plaintiffs 15

C. Petitioners' Challenge To The Validity Of A Facially Neutral Seniority System Adopted In 1954 Is Time-Barred 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases	PAGE
American Tobacco Co. v. *Patterson*, 456 U.S. 63 (1982)	16
Bernard v. *Gulf Oil Corp.*, 841 F.2d 547 (5th Cir. 1988)	17n
Black Law Enforcement Officers Ass'n v. *City of Akron*, 824 F.2d 475 (6th Cir. 1987)	16-17
EEOC v. *Ball Corp.*, 661 F.2d 531 (6th Cir. 1981)	16
Franks v. *Bowman Transportation Co.*, 424 U.S. 747 (1976)	13, 16
Harris v. *Plastics Manufacturing Co.*, 617 F.2d 438 (5th Cir. 1980)	17n
Henn v. *National Geographic Society*, 819 F.2d 824 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987)	16n
International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977)	5, 5n, 12-13, 15, 15n
James v. *Stockham Valves and Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978)	5, 5n, 8n, 12, 15, 15n
Larkin v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549 (11th Cir. 1988), *pet. for cert. filed sub nom. Pullman-Standard* v. *Swint*, 57 U.S.L.W. 3670 (U.S. March 31, 1989) (Nos. 88-1601, 1602)	3n, 7-8, 8n, 10, 11, 12, 15
Lorance v. *A T & T Technologies, Inc.*, ____ U.S. ____, 109 S. Ct. 2261 (1989)	3, 9, 13, 15-16, 17
Mitchell v. *Mid-Continent Spring Co.*, 583 F.2d 275 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979)	14
Peters v. *City of Shreveport*, 818 F.2d 1148 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988)	16n

PAGE

Pullman-Standard v. *Swint* (*Swint VII*), 456 U.S. 273 (1982) 2-3, 7, 14, 14n, 15, 15n

Robinson v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) 15

Sears v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982) 15, 15n, 16

Swint v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943 (N.D. Ala. 1974) 4, 4n, 9n, 11

Swint v. *Pullman-Standard* (*Swint II*), 539 F.2d 77 (5th Cir. 1976) 5, 10n, 11

Swint v. *Pullman-Standard* (*Swint III*), 15 FEP Cas. (BNA) 144 (N.D. Ala. 1977) 5n, 11

Swint v. *Pullman-Standard* (*Swint IV*), 15 FEP Cas. (BNA) 1638 (N.D. Ala. 1977) 5n

Swint v. *Pullman-Standard* (*Swint V*), 17 FEP Cas. (BNA) 730 (N.D. Ala. 1978) 3n, 4n, 5-6, 7, 10, 11, 17

Swint v. *Pullman-Standard* (*Swint VI*), 624 F.2d 525 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982) 6

Swint v. *Pullman-Standard* (*Swint VIII*), 692 F.2d 1031 (5th Cir. 1983) 7n

Swint v. *Pullman-Standard* (*Swint IX*), No. CV 71-P-0955-S (N.D. Ala. Sept. 8, 1986) 7

Swint v. *Pullman-Standard* (*Swint X*), No. CV 71-P-0955-S (N.D. Ala. Nov. 26, 1986) 7n

Taylor v. *Mueller Co.*, 660 F.2d 1116 (6th Cir. 1981) .. 14

Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 13, 15

PAGE

United Airlines, Inc. v. *Evans*, 431 U.S. 553 (1977) 13, 15

Wattleton v. *International Brotherhood of Boiler Makers, Local 1509*, 686 F.2d 586 (7th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) 14, 16

Rule

Federal Rules of Civil Procedure

Rule 52(a) 2-3, 6-7

Statutes

Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987) 16n

Civil Rights Act of 1964

Title VII, 42 U.S.C. §§ 2000e *et seq.* (1982) ....*passim*

§ 703(h), 42 U.S.C. § 2000e-2(h) (1982) ....*passim*

Civil Rights Law

42 U.S.C. § 1981 (1982) 3

Equal Pay Act, 29 U.S.C. § 206(d) (1982) 16n

Judicial Code

28 U.S.C. § 1254(1) (1982), as amended 2

No. 88-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS SWINT, etc., *et al.*,

Petitioners,

—v.—

PULLMAN-STANDARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT PULLMAN-STANDARD IN OPPOSITION

OPINIONS BELOW

For the complete text of all opinions below in this action, the Court is respectfully referred to the Appendix to the Petition for a Writ of Certiorari filed by Pullman-Standard on March 31, 1989, in No. 88-1601. In the course of this Brief in Opposition, citations to sections of the opinions contained in the Appendix to the instant Petition will appear as "Pet. App. ____." Citations to sections of other opinions below contained in the Appendix to Pullman's petition will appear as "Pullman

App. ____." Citations to the trial transcript will appear as "Tr.," and to the instant Petition as "Pet."

JURISDICTION

The decision of the Court of Appeals was entered on September 21, 1988, and a timely petition for rehearing was denied on January 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982), as amended.

STATUTES INVOLVED

The pertinent text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982), and Rule 52(a) of the Federal Rules of Civil Procedure is set out at Pullman App. 293a-298a.

STATEMENT OF THE CASE

Petitioners seek review of the validity of a seniority system which the District Court below has found to be non-discriminatory on four separate occasions over the past fifteen years, and which the Court of Appeals has affirmed as bona fide within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-2(h) (1982). Indeed, the validity of Pullman's seniority system under Section 703(h) was previously before this Court in *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273 (1982) (Pullman App. 231a-258a), which held that the Court of Appeals, in substituting its own findings, had transgressed the proper limits of appellate review under Rule 52 of the Federal Rules of Civil Procedure. On remand from that decision, the District Court reaffirmed its earlier determination that the seniority system had not been adopted or maintained with racially discriminatory intent, and the Eleventh Circuit agreed that these findings were not clearly erroneous. While laboring in this Petition to assert several specious conflicts among the Circuits with respect to the principles governing Section 703(h), petitioners actually seek to have this Court review the findings of both courts below that Pullman

instituted and maintained a seniority system without a discriminatory motive—"a pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." *Swint VII*, 456 U.S. at 287-88 (Pullman App. 243a). In any event, petitioners' challenge to Pullman's seniority system is time-barred under this Court's recent ruling in *Lorance* v. *AT & T Technologies, Inc.*, ____ U.S. ____, 109 S. Ct. 2261 (1989).

On October 19, 1971, Louis Swint and Willie James Johnson initiated this class action under Title VII and 42 U.S.C. § 1981 (1982), naming Pullman and the United Steelworkers of America, AFL-CIO (as well as Local 1466 of the United Steelworkers) (collectively "USW") as defendants. As pertinent to this Petition, they challenged the departmental seniority system at Pullman's Bessemer, Alabama plant—maintained in accordance with the collective bargaining agreements between Pullman and the USW—charging that the system perpetuated the effects of pre-Title VII discrimination. The USW represented production and maintenance employees in twenty-six of the plant's twenty-eight departments; a second union, the International Association of Machinists, AFL-CIO ("IAM"), which represented employees in the remaining two departments, was later joined only for limited remedial purposes.[1]

---

1 Although the IAM had not been named in the original complaint, the amended complaints, or any of the charges filed with the Equal Employment Opportunity Commission ("EEOC"), the District Court permitted joinder of the IAM and its Local Lodge 372 on the eve of trial—not for the purpose of liability, but solely in the event the relief sought by plaintiffs' challenge to the Pullman-USW seniority system might require some modification of the IAM labor agreement. *See Swint* v. *Pullman-Standard* (*Swint V*), 17 FEP Cas. (BNA) 730, 732 n.2 (N.D. Ala. 1978) (Pullman App. 203a n.2).

Petitioners now seek to alter the focus of the entire litigation. Having conceded below that the USW was not acting with discriminatory intent in adopting or maintaining the Pullman-USW seniority system, *see Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549, 1578 n.46 (11th Cir. 1988), *pet. for cert. filed sub nom. Pullman-Standard* v. *Swint*, 57 U.S.L.W. 3670 (U.S. March 31, 1989) (Nos. 88-1601, 1602) (Pet. App. 179a n.45), they offer this Court the wholly novel conten-

Under the Pullman-USW labor agreements, seniority was measured by length of continuous service in a particular department and considered for purposes of layoff, recall and promotion. All employees, white or black, who sought transfer to a new department lost any seniority they had accrued in the old department. This departmental seniority system in effect since 1954 remained virtually unchanged until 1972, when Pullman entered into an agreement with the United States Department of Labor enabling black employees hired before 1965 to transfer from predominantly black departments or to predominantly white departments without losing seniority.[2]

After a 16-day trial, the District Court concluded in 1974 that "the seniority system at Bessemer is not perpetuating the effects of prior discrimination." *Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 952; *see also id.* at 954 (Pullman App. 74a, 78a). Indeed, the trial court pointed out that the "Steelworkers local, which was organized principally by blacks, and whose policies over the years have been shaped as much by blacks as by whites," had advocated departmental seniority and rejected Pullman's proposals to merge several departments for broader seniority units. *Swint I*, 11 FEP Cas. (BNA) at 954 (Pullman App. 78a). On appeal, the Fifth Circuit nevertheless remanded for a new determination of the validity of the senior-

---

tion that this case "also presents" a dispute as to the bona-fides of the Pullman-IAM seniority system (Pet. at 25 n.25). The District Court made clear, however, that "[t]he seniority system under attack in this case has its essence in the 1954 company-wide collective bargaining agreement between Pullman and the United Steelworkers," that the IAM seniority units are "not directly at issue in this litigation," and that evidence concerning IAM is relevant only to the extent it sheds light on the validity of the USW-Pullman system. *See Swint V*, 17 FEP Cas. (BNA) at 732 & n.2 (Pullman App. 185a & 203a n.2). Moreover, the IAM agreements provided for seniority by *occupation* rather than department, *see id.* at 733 n.4 (Pullman App. 204a n.4); a challenge to occupation-based seniority was simply not preserved among the "class issues" listed in the District Court's pre-trial order. *See Swint* v. *Pullman-Standard* (*Swint I*), 11 FEP Cas. (BNA) 943, 948 (N.D. Ala. 1974) (Pullman App. 66a-67a).

2 *See Swint V*, 17 FEP Cas. (BNA) at 732 (Pullman App. 185a).

ity system in light of its rulings as to plaintiffs' evidence of discrimination in initial assignments to departments. *Swint* v. *Pullman-Standard* (*Swint II*), 539 F.2d 77, 97-98 (5th Cir. 1976) (Pullman App. 127a-128a).

While the matter was on remand, this Court rendered its decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), holding that a bona fide seniority system under Section 703(h) could not be invalidated on the ground that it perpetuated the effects of pre-Title VII discrimination. *Teamsters* requires proof of discriminatory intent in the adoption or maintenance of the system in order to find a Title VII violation. Also in the interim, the Fifth Circuit, in *James* v. *Stockham Valves and Fittings Co.*, 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), developed a four-factor test consistent with *Teamsters* for assessing the validity of a seniority system.[3] On remand in 1978, the District Court held further evidentiary hearings and, in an opinion extensively discussing *Teamsters* and the *Stockham Valves* factors, sustained the validity of the Pullman-USW system for the third time. *Swint* v. *Pullman-Standard* (*Swint V*), 17 FEP Cas. (BNA) 730, 732-739 (N.D. Ala. 1978) (Pullman App. 182a-201a).[4]

---

3 *Stockham Valves* requires an inquiry into "1) whether the seniority system operates to discourage all employees equally from transferring between seniority units; 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice); 3) whether the seniority system had its genesis in racial discrimination; and 4) whether the system was negotiated and has been maintained free from any illegal purpose." *See* 559 F.2d at 352.

4 In its second pronouncement on the issue, the District Court, after taking additional evidence, again found the seniority system bona fide. The court did not issue its opinion, however, until after *Teamsters* had been decided. *Swint* v. *Pullman-Standard* (*Swint III*), 15 FEP Cas. (BNA) 144 (N.D. Ala. 1977) (Pullman App. 156a-164a). Subsequently, in view of the fact that plaintiffs had predicated their challenge on a theory rejected by *Teamsters*—the perpetuation of pre-Title VII discrimination—the court reopened the case for what was a third evidentiary hearing and ruling. *Swint* v. *Pullman-Standard* (*Swint IV*), 15 FEP Cas. (BNA) 1638 (N.D. Ala. 1977) (Pullman App. 178a).

First, as to the neutrality of the system, the trial court found that "[t]o the extent the system 'locks' employees into a department and discourages transfers, it does so equally for both white and black," at least until the 1972 Labor Department agreement *favoring* certain black employees. *Id.* at 733 (Pullman App. 187a). Second, the seniority unit structure was found to be consistent with industry practice and a rational response to both the extreme fluctuation in employment levels and the absence of lines of progression within departments. Addressing the existence of two (one USW and one IAM) Die & Tool and Maintenance departments, the court determined that this separation was not orchestrated with discriminatory purpose by Pullman, but was imposed by specific unit determination decisions of the National Labor Relations Board (NLRB). *Id.* at 736 (Pullman App. 193a-194a). Third, although the seniority system had its genesis at a time when racial discrimination was practiced, "this system was not itself the product of this bias," but "came about as a result of colorblind objectives" of a union that "was not an arm of a segregated society." *Id.* at 738 (Pullman App. 198a). Declining to make any findings as to the motives of the IAM, the court ruled that any possible discriminatory motive on the part of that union could not be attributed to Pullman or to the USW. *Id.* at 739 (Pullman App. 199a-200a). Finally, the court found that the Pullman-USW system had been "negotiated and maintained free from any discriminatory purpose." *Id.* at 739 (Pullman App. 200a). Based on the totality of the circumstances, the trial court concluded that the seniority system was bona fide under Section 703(h).

On appeal, the Fifth Circuit reviewed the evidence *de novo*. Stressing the existence of separate Die & Tool and Maintenance departments, the appeals court concluded that the purpose of the IAM was to exclude black workers from its own units, and therefore the motivation of that union infected the validity of the Pullman-USW system. *Swint* v. *Pullman-Standard* (*Swint VI*), 624 F.2d 525, 532-34 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1982) (Pullman App. 218a-222a).

This Court granted certiorari and reversed the Fifth Circuit's failure to honor the limits of appellate review mandated by Rule

52 of the Federal Rules of Civil Procedure. *Pullman-Standard* v. *Swint* (*Swint VII*), 456 U.S. 273, 276 (1982) (Pullman App. 231a-258a). The Court of Appeals had failed to appreciate that under Section 703(h), "there must be a finding of actual intent to discriminate on racial grounds on the part of those who negotiated or maintained the system . . .[, which finding is] a pure question of fact." *Id.* at 289 (Pullman App. 244a-245a). Stating unequivocally that "IAM's discriminatory motivation, if it existed, cannot be imputed to USW," this Court explained that evidence of a discriminatory purpose on the part of the IAM is relevant only to the extent it may shed some light on the purpose of the USW or Pullman "in creating and maintaining the separate seniority system at issue in these cases." *Id.* at 292 n.23 (Pullman App. 248a).

On remand,[5] after yet another trial, the District Court concluded that nothing in plaintiffs' most recent presentation altered the conclusion it had reached in *Swint V* that "[t]he defendants have successfully carried their burden of showing that the seniority system is *bona fide* . . . ." *Swint* v. *Pullman-Standard* (*Swint IX*), No. CV 71-P-0955-S, slip op. at 11 (N.D. Ala. Sept. 8, 1986) (Pet. App. 30a-31a).[6]

The Eleventh Circuit (which inherited this litigation) affirmed on the Section 703(h) issue. *Larkin* v. *Pullman-Standard* (*Swint XI*), 854 F.2d 1549 (11th Cir. 1988), *pet. for cert. filed sub nom. Pullman-Standard* v. *Swint*, 57 U.S.L.W. 3670 (U.S. March 31, 1989) (Nos. 88-1601, 1602) (Pet. App. 58a-211a). Relying on *Teamsters*, the Court of Appeals found no showing that "the [seniority] system *itself* was negotiated or maintained with an actual intent to discriminate," and concluded that "none" of plaintiffs' "evidence goes directly to Pullman's intent regarding the *system*." 854 F.2d at 1576-77 (Pet. App. 171a-175a) (emphasis in original). The Court of Appeals further held that the District Court was warranted in

---

5 *Swint* v. *Pullman-Standard* (*Swint VIII*), 692 F.2d 1031 (5th Cir. 1983) (per curiam) (Pet. App. 1a-4a).

6 The District Court thereafter granted plaintiffs' motion for entry of judgment in *Swint* v. *Pullman-Standard* (*Swint X*), No. CV 71-P-0955-S, slip op. at 5 (N.D. Ala. Nov. 26, 1986) (Pet. App. 41a-57a).

discounting "the plaintiffs' circumstantial evidence in the face of considerable direct evidence that the system was not the product of discriminatory intent," and that "there was nothing to suggest that Pullman acted with discriminatory intent in negotiating or maintaining nontransferable seniority." *Id.* at 1577-78 (Pet. App. 175a-178a).[7]

REASONS FOR DENYING THE WRIT

Although this Petition purports to raise a number of supposed legal issues and to articulate a number of conflicts among the Circuits, it in fact seeks this Court's review of purely factual findings of both courts below that the Pullman-USW seniority system was not adopted or maintained with a racially discriminatory motive. The putative conflicts either do not exist or have already been fully resolved by this Court. Furthermore, peti-

---

7 The Court of Appeals observed that the District Court "carefully analyzed the evidence presented, paying special attention to the four factors" emphasized in the *Stockham Valves* decision. As to whether the seniority system equally discouraged transfers by blacks and whites, the appeals court noted that "[t]he evidence revealed that whites as well as blacks often desired to transfer but were disinclined to do so because they would lose their seniority." On the rationality of the units, the evidence "also showed that systems including nontransferable seniority between given units are quite common not only with manufacturers generally but with manufacturers of railroad cars." Although the seniority system was established at a time when Pullman was "discriminatory in other respects," there was "nothing to suggest that Pullman acted with discriminatory intent in negotiating or maintaining nontransferable seniority." Rather, it was Pullman that sought without success to merge seniority units:

> "Indeed, there was evidence that Pullman would have preferred no seniority or the narrowest seniority possible so that it could have the greatest flexibility in filling vacant positions. There was also evidence that at a meeting of primarily black USW employees, a proposal to merge certain departments was voted down."

In sum, the Court of Appeals concluded that "[h]aving thus found that three of the four *James* factors went against a finding of discriminatory intent, the [district] court was not clearly erroneous in concluding that the seniority system was bona fide." 854 F.2d at 1577-78 (Pet. App. 175a-178a).

tioners' challenge to Pullman's seniority system, adopted in 1954, is time-barred under this Court's ruling in *Lorance* v. *AT & T Technologies, Inc.*, ____ U.S. ____, 109 S.Ct. 2261 (1989). The Petition should be denied.

A. Petitioners' Alleged "Four Seniority Related Practices" Mischaracterize The Record And, At Bottom, Constitute Merely A Disagreement With The Factual Findings Of Both Courts Below

In an effort to create the mirage of a legal issue warranting this Court's attention, petitioners argue that the courts below erroneously concluded that the Pullman-USW system was bona fide in the face of four allegedly racially motivated "seniority related practices": (1) post-Act intradepartmental promotions; (2) the creation of separate IAM and USW Maintenance and Die and Tool departments in 1941; (3) the alleged creation of eight new departments in 1954; and (4) Pullman's requirement after 1965 that individuals seeking positions as welders demonstrate either past experience as a welder or completion of a welder training program (with tuition reimbursement by Pullman).[8] This list of so-called "seniority related practices" mischaracterizes the record and, at bottom, merely constitutes petitioners' disagreement with the manner in which the courts below weighed the evidence.

1. Post-Act Intradepartmental Promotions

Petitioners claim the existence of post-Act discrimination in intradepartmental assignments and describe this alleged practice as "an unresolved dispute" (Pet. at 12). As the Court of Appeals noted, however, because plaintiffs could offer no justification for belatedly attempting to produce evidence on this theory for the first time at the fourth trial in 1984, the District

---

8 Black employees were principal beneficiaries of this reimbursement program. *Swint I*, 11 FEP Cas. (BNA) at 947 & n.16 (Pullman App. 65a & 94a n.16).

Court did not abuse its discretion in excluding it. *Swint XI*, 854 F.2d at 1578 (Pet. App. 180a-182a).[9]

2. The Creation of Separate IAM and USW Departments in 1941

Petitioners complain of the creation in 1941 of separate IAM and USW Maintenance and Die and Tool Departments, along with the IAM's agreement in 1944 to cede certain of its own job classifications to the USW (Pet. at 15-20). Both courts below found that these events did not undermine the validity of the Pullman-USW seniority system. The District Court determined that the existence of these divided departments was "due to actions of the NLRB in 1941," that there was no evidence of "any industry practice to combine positions represented by different unions into the same seniority unit," and that any dispute over the IAM's motivation in ceding the job classifications was irrelevant because neither Pullman nor the USW had been motivated by racial discrimination. *Swint V*, 17 FEP Cas. (BNA) at 736, 738-39 (Pullman App. 193a, 199a-200a). The Court of Appeals upheld the findings as to the rationality of the seniority units and the absence of a discriminatory motive on Pullman's part. *Swint XI*, 854 F.2d 1577-78 (Pet. App. 179a-180a).

3. The Alleged Creation of Eight New Departments In 1954

Petitioners also challenge the failure to resolve whether Pullman acted with racial motivation in allegedly creating eight new departments in 1954 (Pet. at 24). There has never been a finding below, however, that eight new departments were created that year. In any event, the District Court, after assessing the evidence presented as to all of Pullman's departments, expressly

---

9 As to the issue of posting job vacancies, which petitioners attempt to link to this foreclosed issue of intradepartmental assignments (Pet. at 13-14), the Court of Appeals in *Swint II* agreed with the District Court that any failure to post vacancies did not state an independent Title VII violation. *See Swint II*, 539 F.2d at 102 (Pullman App. 134a).

determined that the Company's departmental structure was "rational, in accord with the industry practice, and consistent with NLRB policies," and "that the seniority system between the company and the USW has been negotiated and maintained free from any discriminatory purpose." *Swint V*, 17 FEP Cas. (BNA) at 737, 739 (Pullman App. 195a, 200a). Moreover, it was the USW—who petitioners now concede was not motivated by racial animus (*see* note 1, *supra*)—that resisted Pullman's efforts to merge departments for broader seniority units. *Id.* at 736-37 n.18, 738 (Pullman App. 205a n.18, 198a). The Court of Appeals admitted that its previous conclusion to the contrary did not survive this Court's *Swint* decision, and sustained the District Court's findings both as to the rationality of the seniority units and the absence of evidence of discriminatory intent on Pullman's part in negotiating or maintaining the nontransferable seniority system. *Swint XI*, 854 F.2d at 1577-78 & n.45 (Pet. App. 177a-179a & n.44).

4. The 1965 Training Requirement

Petitioners' final dispute with the record concerns Pullman's decision in 1965 to assign to welding positions only those who had prior experience as welders or who had completed a welder training program (with tuition reimbursement by Pullman) (Pet. at 24-28). Initially, as both courts below noted in earlier decisions, it is doubtful whether this issue—not listed among the "class issues" in the pre-trial order—is properly in the case. *See Swint I*, 11 FEP Cas. (BNA) at 947 n.16 (Pullman App. 94a n.16); *Swint II*, 539 F.2d at 89 (Pullman App. 114a). In any event, the District Court's factual findings—that Pullman "actively sought and trained blacks" to be welders, imposed a training requirement for the nondiscriminatory reason of "prevent[ing] on-the-job training of unqualified whites," and did so only after "black employees were given an opportunity to demonstrate their skills as welders"—remain undisturbed. *Swint III*, 15 FEP Cas. (BNA) at 152 & n.21 (Pullman App. 170a & 176a n.21).[10]

---

10 Petitioners' selective quotation from the testimony of Harry Debrow, a black equal employment officer at Pullman, (Pet. at 27

B. The Purported Conflicts Among The Circuits Do Not Withstand Analysis

None of petitioners' purported conflicts among the Circuits withstands analysis.

1. Petitioners Improperly Characterize The Focus Of The Court Below As Restricted To The Neutrality Of The Literal Terms Of The Seniority Rules

Petitioners first assert that the Eleventh Circuit is in conflict with several other Circuits in confining its assessment of the validity of a seniority system to the neutrality of the rules as written. This assertion mistakes the nature of the inquiry undertaken by the District Court and affirmed by the Court of Appeals. By their careful consideration of all of the factors suggested in *Teamsters* and *Stockham Valves*, both courts below plainly did not restrict their focus to the literal terms of the Pullman-USW system. The Court of Appeals concluded, moreover, that on the record it could not say that "the district court attributed insufficient significance to plaintiffs' circumstantial evidence in the face of considerable direct evidence that the system was not the product of discriminatory intent." *Swint XI*, 854 F.2d at 1577 (Pet. App. 175a-176a).

Ultimately, petitioners are questioning the holding of this Court in *Teamsters*. Central to that decision is the distinction between discriminatory practices—independent of a seniority system—that may impact upon seniority rights and intentional

---

n.12), indicates only that whites may have been unwilling to train more senior employees, whether black or white, who could then displace them. This emerges clearly from Debrow's testimony on direct:

> "A • • • So this young man, he agreed to go to school. Nobody there in his department would teach him how to do the job. The operators who were there said they weren't going to train him *because he had seniority over them.*
>
> "Q Was the man you are talking about a Black man?
>
> "A Black and White. It was a White man operating at the present, and they wouldn't train him." (1984 Tr. 121-22) (emphasis supplied)

discrimination in the adoption or maintenance of the seniority system itself. There was no question in the *Teamsters* case that the union and employer had engaged in purposeful discrimination by deliberately barring black employees from higher-paying line driver jobs. The non-transferable departmental seniority system, in turn, perpetuated the effects of that discrimination by discouraging blacks from transferring thereafter to the higher-paying jobs and forfeiting their seniority. Nevertheless, this Court held that the seniority *system itself* was shielded under Section 703(h) in the absence of a finding of discriminatory intent in the adoption or maintenance of the system.

Findings of intentional discriminatory practices that affect senority rights—such as the exclusion of black employees from higher-paying jobs—certainly warrant specific remedies for the victims of those practices, including awards of competitive seniority under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). But to hold, as petitioners suggest, that such practices—insofar as they impact upon entitlements under a seniority system—therefore render the entire seniority system invalid, would undermine the thrust of *Teamsters* and would require relief for a vastly larger group that would not otherwise qualify for relief under *Franks*. This Court has therefore concluded repeatedly that " 'absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences.' " *Lorance* v. *AT & T*, *supra*, 109 S. Ct. at 2265, quoting *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977). Rather, there must be a showing—not made in this case—of discriminatory purpose infecting the system itself. *See id.* at 83 n.13; *see also United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558-60 (1977).

Moreover, none of the cases cited by petitioners in their endeavor to chart a conflict embraces their expansive theory or is inconsistent with the ruling below by the Eleventh Circuit. To the extent these cases are remotely on point, they involve appellate affirmance of trial court findings that the seniority system itself was adopted or maintained with discriminatory intent. *See*

Wattleton v. *International Brotherhood of Boiler Makers, Local 1509*, 686 F.2d 586, 590-91 (7th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) (affirming trial court's factual finding that the seniority system itself was negotiated and maintained for illegal discriminatory purpose) *Taylor* v. *Mueller Co.*, 660 F.2d 1116, 1123 (6th Cir. 1981) (requiring proof of an "illegal purpose [that] entered into the negotiation of the seniority system"); *Mitchell* v. *Mid-Continent Spring Co.*, 583 F.2d 275, 280 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979) (overt sex-based seniority lists; no discussion of Section 703(h)).

2. IAM's Motive May Not Properly Be Imputed To Pullman

Petitioners also urge this Court to resolve a putative conflict between the Eleventh Circuit and the Tenth and Fourth Circuits over whether an employer can escape liability under Title VII by claiming that it was merely accommodating the discriminatory preferences of a union. This, too, misstates what the Court of Appeals held below.

The Eleventh Circuit simply followed this Court's instructions in *Swint VII*:

> "IAM's discriminatory motivation, if it existed, cannot be imputed to USW. It is relevant only to the extent that it may shed some light on the purpose of the USW or the Company in creating and maintaining the separate seniority system at issue in these cases. A discriminatory intent on the part of IAM, therefore, does not control the outcome of these cases. Neither does the fact, if true, that USW acquiesced in racially discriminatory conduct on the part of the IAM. Such acquiescence is not the equivalent of a discriminatory purpose on the part of the USW." *Swint VII*, 456 U.S. at 292 n.23 (Pullman App. 248a).[11]

---

11 Recognizing the force of this Court's *Swint VII* instructions, petitioners abandoned in the latest appeal their contention that the USW acted with a discriminatory purpose (*see* note 1, *supra*). They nevertheless struggle to keep Pullman in the case by contending, for the first time in this Petition, that this case somehow "also involves" the validity of the Pullman-IAM system (*see id.*).

The Court of Appeals did not ignore evidence of the IAM's possibly racial motives. Rather, the court held—in agreement with the District Court—that there was "nothing" in the record "to suggest that *Pullman* acted with discriminatory intent in negotiating or maintaining nontransferable seniority." *Swint XI*, 854 F.2d at 1577-78 (Pet. App. 175a-178a) (emphasis added).

The cases cited by petitioners in support of a purported conflict among the Circuits on this issue are either off the mark, *see Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (pre-*Teamsters* decision applying disparate impact analysis), or simply involve an application of the *Teamsters-Stockham Valves* factors to a different set of facts, *see Sears* v. *Bennett*, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982).[12]

3. The Court Below Properly Placed The Burden Of Persuasion On Plaintiffs

Finally, petitioners maintain that the Eleventh Circuit is in conflict with other Circuits in placing on plaintiffs the burden of persuading the trier of fact that a seniority system is the product of discriminatory intent. This burden-allocation is consistent, however, with decisions of this Court that Section 703(h) "unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." *Trans World Airlines, Inc.* v. *Hardison*, *supra*, 432 U.S. at 83 n.13; *see also Swint VII*, 456 U.S. at 289; *Teamsters* v. *United States*, *supra*, 431 U.S. at 353; *United Airlines, Inc.* v. *Evans*, *supra*, 431 U.S. at 553-54. This Court's recent decision in *Lorance* v. *AT & T*, *supra*, 109 S.Ct. 2261, makes clear that Section 703(h) does not create an affirmative defense to be proved by

---

12 In *Sears*, decided before this Court's *Swint VII* decision, the appeals court's brief discussion of employer liability was not predicated on an imputation of the union's discriminatory motives to the employer. Rather, employer liability was found because the application of the *Teamsters-Stockham Valves* factors led to the conclusion that the seniority system was not bona fide under Section 703(h). Moreover, the employer in that case had settled, rendering the court's discussion of the employer's liability dictum. *See* 645 F.2d at 1368.

defendant, but rather stipulates that discriminatory intent is an element of the statutory offense to be established by plaintiff. A contrary interpretation of Section 703(h) is:

> "foreclosed by our cases, which treat the proof of discriminatory intent as a necessary element of Title VII actions challenging seniority systems. At least as concerns seniority plans, we have regarded subsection (h) not as a defense to the illegality . . . but as a provision that itself 'delineates which employment practices are illegal and thereby prohibited and which are not.' *Franks*, 424 U.S., at 758, 96 S. Ct., at 1261. Thus, in *American Tobacco Co.* [v. *Patterson*, 456 U.S. 63 (1982)] we determined § 703(h) to mean that 'the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved.' 456 U.S., at 65, 102 S. Ct., at 1535." *Lorance* v. *AT & T*, *supra*, 109 S.Ct. at 2267.[13]

Moreover, petitioners fail to identify any conflict among the Circuits on the issue. Two cases—cited in other parts of the Petition—place the burden of persuasion properly on the plaintiff. *See Wattleton* v. *Boiler Makers*, *supra*, 686 F.2d at 590; *Sears* v. *Bennett*, *supra*, 645 F.2d at 1370. Although the Sixth Circuit initially referred to the issue in an ambiguous manner, *see EEOC* v. *Ball Corp.*, 661 F.2d 531, 538-39 (6th Cir. 1981), it has subsequently stated unequivocally—as did the Eleventh Circuit here—that the burden is on the plaintiff. *See Black Law*

---

13 Petitioners' reliance on decisions arising under other statutes—the Equal Pay Act, 29 U.S.C. § 206(d) (1982) and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987)—is misplaced. The Equal Pay Act does not require proof of discriminatory intent; a statutory violation is made out by demonstrating unequal pay between men and women in equal jobs. *See, e.g., Peters* v. *City of Shreveport*, 818 F.2d 1148, 1153 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988). The seniority plan defense under Section 4(f)(2) of ADEA, 29 U.S.C. § 623(f)(2), does not come into play until what would otherwise be a statutory violation already has been proven. *See, e.g., Henn* v. *National Geographic Society*, 819 F.2d 824, 827-28 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987).

Enforcement Officers Ass'n v. *City of Akron*, 824 F.2d 475, 481 (6th Cir. 1987).[14]

C. Petitioners' Challenge To The Validity of a Facially Neutral Seniority System Adopted In 1954 Is Time-Barred

The departmental seniority system challenged in this case was established as a result of the 1954 collective bargaining agreement between Pullman and USW. *See Swint V*, 17 FEP Cas. (BNA) at 732 & n.2 (Pullman App. 184a & 203a). Under the Court's *Lorance* v. *AT & T* decision, a Title VII challenge to a facially neutral seniority system, as here, requires the filing of a charge with the EEOC within 180 days of adoption of the system, or it is time-barred. As this Court observed: "allowing a facially neutral system to be challenged, and entitlements under it to be altered, many years after its adoption would disrupt those valid reliance interests that § 703(h) was meant to protect." *Lorance* v. *AT & T*, *supra*, 109 S. Ct. at 2269.

---

14 Petitioners point also to the Fifth Circuit in *Bernard* v. *Gulf Oil Corp.*, 841 F.2d 547, 551, 554 (5th Cir. 1988). The *Bernard* court, however, did not hold that a defendant has the burden of proving that its seniority system is valid; at the pages cited, the court simply restated plaintiffs' characterization of the issues as including defendant's failure of proof with respect to Section 703(h). Moreover, as cited by the Court of Appeals below, the Fifth Circuit previously has indicated its view that the burden rests with plaintiff. *See Harris* v. *Plastics Manufacturing Co.*, 617 F.2d 438, 440 (5th Cir. 1980) (per curiam).

CONCLUSION

Petitioners are seeking review of findings of fact adopted by both courts below and present no significant legal issue or conflict among the Circuits warranting this Court's resolution. The Petition therefore should be denied.

Respectfully submitted,

Floyd Abrams*
Thomas J. Kavaler
Samuel Estreicher
Taryn V. Shelton
Peter Phillips

CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

**Counsel of Record for Respondent*

Of Counsel:

C.V. Stelzenmuller
BURR & FORMAN
3000 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-3000